Supreme Court, U.S.
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No. 92-1767

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CHRIS J. WHITE,

Petitioner

v.

THOMAS RUSSELL COONEY AND
LORA JOHN COONEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Respondents' Brief in Opposition

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QUESTION PRESENTED

Whether the Wyoming Supreme Court erred in determining that a prosecutor was not entitled to absolute immunity from liability under 42 U.S.C. § 1983 in causing a perjured a petition for probation revocation to be issued which subsequently led to the arrest and incarceration of Respondent Thomas Russell Cooney for thirty-eight days without bail or preliminary hearing.

PARTIES TO THE PROCEEDING

The Respondents agree with the statement of the parties to the proceeding as set forth by the Petitioner.

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The Respondents Thomas Russell Cooney and Lora John Cooney respectfully request that this Court deny the Petition for Writ of Certiorari.

DECISION BELOW

The Respondents agree with the Petitioner's statement of the decision below.

JURISDICTION

The Respondents agree with the Petitioner's statement of jurisdiction.

APPLICABLE STATUTES AND RULES

The Respondents agree with the Petitioner's designation of the applicable statutes and rules with the exception of Rule 39(a) of the Wyoming Rules of Civil Procedure as amended by the Wyoming Supreme Court in 1992. In fact the statute which was applicable at the time Mr. Cooney was arrested and incarcerated was Wyo. Stat. § 7-13-408 (1987) which reads:

> (a) The state probation and parole officer shall notify the department and the board or the appropriate court if it is determined consideration should be given to retaking or reincarcerating a person under the supervision of the department who has violated a condition of his probation, parole or other conditional release. Prior to notification, a hearing shall be held in accordance with this section within a reasonable time, unless a hearing is waived by the probationer, parolee or conditional releasee. As soon as practicable, following termination of any hearing, the

appropriate officer or agent shall report to the department and the court or board, furnish a copy of the hearing record and make recommendations regarding the disposition to be made of the probationer, parolee or conditional releasee. Pending any proceeding pursuant to this section, the appropriate agent may take custody of and detain the probationer, parolee or conditional releasee involved for a reasonable period of time prior to the hearing. If it appears to the hearing officer or agent that retaking or reincarceration is likely to follow, the agent may take custody of and detain the probationer, parolee or conditional releasee for a reasonable period after the hearing or waiver as may be necessary to arrange for the retaking or reincarceration.

(b) Any hearing pursuant to this section may be before the state probation and parole officer, his designated hearing officer or any other person authorized pursuant to the laws of this state to hear cases of alleged probation, parole or conditional release violations, except that no hearing officer shall be the person making the allegation of violation.

(c) With respect to any hearing pursuant to this section, the probationer, parolee or conditional releasee:

> (i) Shall have reasonable notice in writing of the nature and content of the allegations to be made including notice that the purpose of the hearing is to determine whether there is probable cause to believe that he has committed a violation that may lead to a revocation of probation, parole or conditional release;

(ii) Shall be permitted to consult with any person whose assistance he reasonably desires, prior to the hearing;

(iii) Shall have the right to confront and examine any person who has made allegations against him, unless the hearing officer determines that the confrontation would present a substantial present or subsequent danger of harm to the person;

(iv) May admit, deny or explain the violation alleged and may present proof, including affidavits and other evidence, in support of his contentions.

(d) A record of the proceedings under this section shall be made and preserved either by stenographic means or through the use of a recording machine.

STATEMENT OF THE CASE

The Respondents agree with the Petitioner's statement of the case with the exception of the suggestion that in **Cooney II** the Wyoming Supreme Court determined the status of immunity for all of the Petitioner's conduct. In fact, the Wyoming Supreme Court specifically limited its opinion to the determination that the Petition was not entitled to absolute immunity for his conduct in causing the perjured petition to be issued. The Court specifically refused to determine what level of

immunity, if any, was available for the remaining conduct of the Petitioner. Cooney II, 847 P.2d at 366-369.

THIS COURT SHOULD REFUSE TO GRANT THE WRIT

I.

THE PETITIONER HAS MISINTERPRETED THE DECISION OF THE WYOMING SUPREME COURT IN COONEY II, IN WHICH THE WYOMING SUPREME COURT CORRECTLY APPLIED THE FUNCTIONAL ANALYSIS TEST REQUIRED BY THE DECISIONS OF THIS COURT.

The primary basis for the Petitioner's contention that this Court should grant a Writ of Certiorari to review the Wyoming Supreme Court's decision in Cooney II is the argument that in reaching that decision, the Court failed to apply the functional analysis test required by the decisions of this Court, and instead established a "place-time of activity" evaluation. It is respectfully submitted that the Petitioner has misinterpreted the Wyoming Supreme Court's decision in Cooney II.

In Cooney II, the Wyoming Supreme Court specifically noted that this Court's opinion in Burns v. Reed, 500 U.S. ____, 111 S.Ct. 1934, 114 L.Ed.2d 547

(1991) reiterated the functional approach originally established in **Imbler v. Pachtman**, 424 U.S. 409, 96 S.Ct. 984, 46 L.Ed.2d 128 (1976). (**Cooney II** at 845 P.2d 358). The Court then applied the three part test for absolute immunity claims set forth in **Butz v. Economou**, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978).

In applying that test, the Wyoming Supreme Court specifically found that there was no historical basis for extending absolute immunity to the Petitioner's conduct in assisting and advising a probation officer on initiating probation revocation proceedings. The Court specifically found that under Wyoming law such activity by a prosecutor was voluntary, and not required by statute or case law. **Cooney II** at 845 P.2d 364. In doing so, the Wyoming Supreme Court noted that the relevant statute at the time, Wyo. Stat. § 7-13-408 (1987) did not compel the county attorney's involvement in creating a petition to revoke probation. At that stage of the proceeding, the petition could have been prepared entirely by the probation officer without any involvement by the

prosecuting attorney. Thus, the Court found that at that stage of the proceeding "the prosecutor was functioning more like a probation officer than as a county attorney responsible for criminal conduct prosecution. It was not his job to request probation revocation petitions -- perjured or otherwise -- from probation officers and the judicial system did not rely on him to do so. **Cooney II** at 845 P.2d 365.

One of the principal errors in the petition presented to this Court is the argument that somehow the Court should consider Rule 39(a) of the Wyoming Rules of Civil Procedure, as amended in 1992, to determine the nature and extent of a prosecutor's required involvement in a probation revocation hearing. Undisputably, the Rule as amended in 1992 now requires that a petition for revocation be filed by the attorney for the state. In 1986, however, when the petition for revocation which is the subject of this case was prepared, the Wyoming statutes clearly allowed such a petition to be prepared by the

probation officer only, a fact which was correctly recognized by the Wyoming Supreme Court in **Cooney** II.

In rejecting absolute immunity for the Petitioner's conduct, the Wyoming Supreme Court went on to note that there was no public policy reason for extending absolute for the Petitioner's involvement in obtaining the perjured petition for revocation in the instant case. The Court said: "the United States Supreme Court hit this prosecutor's status precisely on its figurative head when it asserted that qualified immunity provides ample protection for 'all but the plainly incompetent of those who knowingly violate the law.'" **Cooney II** at 365, *quoting* **Burns**, 500 U.S. at ____, 111 S.Ct. at 1944.

The Wyoming Supreme Court finally noted that for the specific conduct it was considering, there were not adequate procedural safeguards other than civil liability to deter prosecutorial misconduct:

> We base our departure from this segment of the majority in **Cooney I** on the critical factor that all such "due process safeguards" depend on judicial intervention and are premised on the assumption that the judge will be given complete and accurate

> information. Where, as here, the perjured petition is prepared prior [Court's emphasis] to court involvement and the petition is then advanced through the revocation proceeding without the judge ever becoming informed of the inherent fallacy of the document's contents, the "safeguards" are useless. Cooney II at 365-366.

In summary, the Wyoming Supreme Court applied the appropriate test, considered the relevant factors, and correctly determined that the conduct of the Petitioner in causing to be created a perjured petition for revocation were the functional equivalent of the actions of a probation officer, and therefore not entitled to absolute immunity. Nowhere did the Wyoming Supreme Court attempt to create a new "place-time of activity" test, and the Petitioner's suggestion that this Court should review Cooney II for that reason should be rejected.

II.

THIS COURT'S DECISION IN BURNS PROVIDES AMPLE DIRECTION TO THE COURTS OF APPEAL IN DETERMINING ABSOLUTE IMMUNITY QUESTIONS.

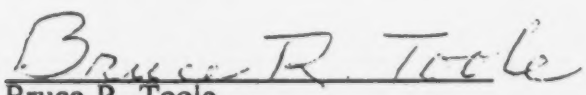
In the next section of its petition, the Petitioner argues that there have been conflicts between the federal circuits regarding the level of immunity to be provided to

public officials who seek arrest or similar warrants to initiate proceedings. A review of the cases cited by the Petitioner disclose that these conflicts arose prior this Court's decision in **Burns**. It is respectfully submitted that this Court's decision in **Burns** provides ample guidelines to the federal circuits to allow them to adequately consider and decide questions of absolute immunity. It is not necessary to grant this petition to resolve a conflict between the federal circuits.

CONCLUSION

For the reasons set forth above, the Respondents respectfully request that this Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully Submitted,



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